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VIA ELECTRONIC SUBMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: ***Notice of Ex Parte - CC Docket Nos. 93-193, 94-65***

Dear Ms. Dortch:

SBC Communications Inc. ("SBC"), on behalf of The Ameritech Operating Companies, Nevada Bell Telephone Company, and Pacific Bell Telephone Company, hereby responds to AT&T Corp. and Sprint's Oppositions to SBC's Proposed Refund Plan in the foregoing Docket, filed August 30, 2004.

1. AT&T

AT&T argues that the Commission should reject SBC's proposal to use the IRS rate for corporate overpayments in excess of $10,000 to calculate interest and require SBC to use the higher IRS corporate overpayment rate. According to AT&T, Commission precedent requires SBC to use the higher corporate overpayment rate because SBC and the other LECs had constructive knowledge that add back was required. As SBC demonstrates below, the Commission should reject AT&T's arguments and approve SBC's Refund Plan as filed.

Contrary to AT&T's claims, Commission precedent does not require application of the higher IRS corporate overpayment rate here. When choosing between applying the IRS rate for corporate overpayments or IRS rate for corporate overpayments in excess of $10,000, this Commission has chosen the former in instances where it determined that a carrier had at least "constructive knowledge" that the Commission would reject the practice at issue as unlawful.[1] AT&T argues that the LECs here had constructive knowledge that a failure to apply addback in 1993 and 1994 would be found unlawful by the Commission. But the Commission's recent *Add Back Order*[2] and precedent cited by AT&T belie this claim.

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[1] *General Communications, Inc. v. Alaska Communications Systems Holdings Inc.*, 16 FCC Rcd 2834, 2863 (2001) ("ACS Decision") ("Further, although we do not necessarily agree with GCI that ATU engaged in "willful misconduct," which might merit awarding the highest interest rate as a penalty, we do note that ATU had at least constructive knowledge, before it prepared its final Monitoring Report, that the Commission had rejected other carriers' attempts to assign ISP traffic to the interstate jurisdiction, and would similarly reject ATU's attempt.").

[2] *1993 Annual Access Tariff Filings & 1994 Annual Access Tariff Filings*, CC Docket Nos.93-193 & 94-65, FCC 04-151 (rel. July 30, 2004) ("Add Back Order").

In the *Add Back Order*, the Commission concluded, "we find, therefore, that the applicable rules, i.e. the pre-1995 rules in effect when the tariffs under investigation were filed, did not speak explicitly to the add-back practices at issue in this investigation."[3] This conclusion squarely demonstrates that the LECs could not have had constructive knowledge that they were *required* to apply add back under the pre-1995 rules.

Ignoring this finding, AT&T claims that the D.C. Circuit explained in 1996 that add back was implicit in the sharing rules from the beginning, which is not the case. Rather, the D.C. Circuit merely restated the *Commission's* conclusion in the 1995 Add-back Order that add back was implicit in the sharing rules from the beginning.[4] Ultimately, the Court concluded that the Commission's adoption of the add-back rule in 1995 was reasonable based on the record in that proceeding, but, importantly, did not conclude that add back was required under the pre-1995 rules.

AT&T further avers that Commission suspension of the 1993 tariffs and institution of the Add-Back NPRM was sufficient to give the LECs "constructive knowledge" with respect to their 1994 tariffs. But suspension of a tariff in no way equates to constructive knowledge that the Commission's price cap regime required carriers to add back. In the *ACS Decision*, the Commission concluded that ACS had constructive knowledge because the Commission *had already rejected the same practice by other carriers*.[5] Such is not the case here. Prior to 1995, the Commission had neither addressed add back in the context of price cap regulation nor required carriers to add back. The fact that the Commission decided to investigate whether the LECs' practice of not applying add back was lawful under Section 201 of the Act would in no way result in carriers having constructive knowledge that application of add back was *already required* under price cap regulation. The Commission has suspended LEC tariffs on a number of occasions and many of these tariffs are found to be reasonable under Section 201. Further, the Commission's initiation of a rulemaking proceeding to address whether it *should* revise its rules prospectively to require add back neither means nor implies that a carrier's failure to add back under the then-existing rules was unlawful.

Moreover, as the Commission concluded in the *Add Back Order*, the LECs obligation to issue refunds here "does not amount to a penalty."[6] Application of the higher IRS corporate overpayment rate,

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[3] *Id.* ¶16.

[4] *Bell Atlantic Tel Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996).

[5] *ACS Anchorage, Inc v. FCC*, 351 U.S. App. D.C. 317, 290 F.3d 403 (2002). Notably, on appeal of the *ACS Decision*, the DC Circuit specifically questioned the Commission's reasoning for applying the IRS corporate overpayment rate, rather than the large corporate overpayment. Specifically, the Court concluded that the Commission's "constructive knowledge" reasoning was flawed, because the Commission did not reject other carrier's attempts to engage in the disputed practice (i.e. assigning ISP traffic to the interstate jurisdiction) until *after* ACS filed its tariffs. *Id.* at 415. Thus, it was unclear to the Court "why a company's acquisition of 'constructive knowledge' of Commission views after its collection of disputed rates should affect its culpability for that collection." *Id.* Further, because there was no allegation of bad faith in the record, the Court concluded that it did not understand why the case was any different from a case where "a defendant has simply miscalculated revenue or demand and accidentally exceeded its rate of return" – actions which the FCC itself stated might justify application of the lower IRS large corporate overpayment rate. The issue ultimately was remanded back to the Commission.

[6] *Add Back Order*, ¶20.

where the lower IRS rate for corporate overpayments in excess of $10,000 is available, could only be punitive, thereby directly contradicting the Commission's finding that the required refunds here are not punitive in nature.

The fact is AT&T has not shown and the Commission did not conclude in the *Add-Back Order* that the LECs acted in bad faith with respect to their 1993 and 1994 tariff filings. Thus, the LECs failure to addback, which was just determined to be unlawful, is analogous to a miscalculation. Given that the Commission has concluded that the *refunds* here do not constitute a penalty, nor should any component of the refund, which would include the interest assessed. SBC and the other LECs should only be required to compensate the IXCs for use of their money at the interest rate applicable to their customer group, i.e. the IRS rate for corporate overpayments in excess of $10,000 large corporate overpayment rate.

2. Sprint

Sprint asks the Commission to reject SBC's presubscribed telephone line methodology ("Method Two") for determining individual refund amounts, arguing that such methodology does not account for special access. Further, Sprint proposes that the FCC require SBC to use interstate access revenues as the alternative proxy.

Sprint is correct that presubscribed telephone lines are not representative of special access use by carriers, however, Sprint ignores the fact that special access revenues only account for a negligible amount of SBC's $14.1 million refund liability, specifically only $1/10^{th}$ of one percent (approximately $16,000). The remaining 99% of the refund liability is attributable to carrier common line rates ("CCL") and traffic sensitive rates, which are more closely associated with presubscribed telephone lines because all are driven by long distance users. SBC's use of presubscribed telephone lines is thus a reasonable proxy and should be approved by the Commission.

Very truly yours,

/s/ Davida S. Grant

cc: Tamara Preiss
Deena Shetler